Supreme Court, U.S.
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91-1696

NO. A-574

IN THE SUPREME COURT OF THE UNITED STATES

DAVID B. BOWMAN, Petitioner

v.

STATE OF INDIANA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

DAVID B. BOWMAN
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PRO SE PETITIONER

QUESTIONS PRESENTED

Whether an employee who has been classified by his employer as an exempt executive or administrative employee under 29 U.S.C. § 213(a)(1) of the Fair Labor Standards Act and is subject to "salary basis" treatment under 29 C.F.R. § 541.118, may be prosecuted for theft of his salary and official misconduct based on the hours on that employee's time card, when the employer knows that the time card is incorrect, and when that meployer has permitted that employee to work many uncompensated hours over forty per week.

LIST OF PARTIES

The caption set forth on the cover page to this petition sets forth all of the named parties to this proceeding.

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The petitioner, David B. Bowman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, Second District, entered in the above-entitled proceeding on June 26, 1991, and denied transfer to the Indiana Supreme Court on November 20, 1991.

OPINION BELOW

The opinion of the Court of Appeals of Indiana, Second District, is reprinted

JURISDICTION

The judgment of the Court of Appeals of Indiana, Second District, was entered on June 26, 1991, affirming petitioner's convictions. The Court of Appeals, Second District, denied a timely petition for rehearing on August 15, 1991. Thereafter, on November 20, 1991, the Supreme Court of Indiana denied a timely petition to transfer without opinion. On February 9, 1992, Justice Stevens signed an order extending the time for filing the petition for certiorari to and including April 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. z 1257 is the jurisdictional statute covering Supreme Court review of state court judgments.

29 U.S.C. § 207 requires the payment of mandatory overtime for hours worked by non-exempt employees when they exceed forty per week.

29 U.S.C. § 213(a)(1) is the statute which describes the bona fide executive, administrative, or professional exemption from mandatory overtime.

I.C. 22-2-1-1 is Indiana's legal workday statute, which was repealed in 1982.

I.C. 36-8-4-8 is Indiana's maximum workday and workweek for police officers.

29 C.F.R. § 541.1 is the regulation which describes the requirements to exempt an employee under the executive portion of 29 U.S.C. § 213(a)(1).

29 C.F.R. § 541.2 is the regulation which describes the requirements to exempt an employee under the administrative portion of 29 U.S.C. § 213(a)(1).

29 C.F.R. § 541.118 is the regulation which describes what salary basis means.

STATEMENT OF THE CASE

Abbreviated Facts Prior to Indictment

The saga of how petitioner,

a twenty-five year police officer who had been promoted to the merit rank of captain, who had receive fourteen letters of appreciation and commendations (Record at 1401), who was described as an excellent police officer (Record at 52, 383, 518) and a hard worker (Record at 528) who worked more than was required (Record at 527, 528), even coming into work on his days off and donating his time (Record at 1166, 1167), and who was described as being very honest, very truthful (R1069), sincere, hardworking, honest, God-fearing (R1057), trustworthy, of the highest integrity (Record at 746), and loyal (Record at 677), found himself in Marion County Superior Court, Criminal Division, charged with theft of his paycheck and official misconduct based upon the alleged theft, begins this way: at the time that the Indianapolis Police Department implemented the use of time cards in April, 1986, amid

mass confusion (Record at 532, 533, 534, 1170), petitioner held the merit rank of lieutenant. To facilitate the implementation, the Indianapolis Police Department promulgated a work rule, General Order No. 20.03 (Record at 299; Pet. App. B), designed "to ensure Departmental conformity with the requirements of the Fair Labor Standards Act;" its stated purpose was "to define and explain the provisions of the Fair Labor Standards Act as they relate to work scheduling and overtime within the Indianapolis Police Department." It defined Indianapolis Police Department officers as non-exempt [actually "partially exempt' under 29 U.S.C. § 207(k)], exempt [under 29 U.S.C. § 213(a)(1)], and appointive [also pursuant to 29 U.S.C. § 213(a)(1)]. General Order No. 20.03 (Record at 299) provided that sergeants, lieutenants, and captains would be exempt from the payment of mandatory overtime "in

accordance with their job duties" and "as those terms are defined under the Act."

Superior officers were briefed by the Indianapolis Police Department Finance Branch, receiving the following directives: no more than 160 hours could appear on the 28-day time card even if more were worked (Record at 535, 605); overtime worked could only be shown on an overtime slip (Record at 603); and there was no document on which a superior officer (sergeant, lieutenant, captain) could show that he or she had worked extra hours if not eligible for nor requesting overtime (Record at 605). Further, they were advised that non-exempt employees (e.g., secretaries) must not be permitted to begin work one minute early or work one minute past closing time or overtime would be owed to that employee.

As a lieutenant, petitioner's

supervisor permitted and even encouraged petitioner's time spent on his regularly scheduled days off to maintain a computerized study of crime trends initiated by petitioner as a management tool for more efficient allocation of manpower (Record at 1166, 1167). Petitioner did not expect compensation for this time due to his exempt status, and no compensation was furnished nor offered.

Petitioner was promoted to the rank of captain in December, 1986, and assigned as a captain for Quadrant Three, an area comprising one-fourth of the City of Indianapolis. Quadrant Three was commanded by Michael Zunk, who held the appointed rank of major.

Upon petitioner's assignment to Quadrant Three, Michael Zunk advised petitioner that he, Michael Zunk, would handle day shift, and that he wanted petitioner to handle the problems on

middle shift [approximately 1:30 to 9:30], tact shift [approximately 6:00 p.m. to 2:00 a.m.], and late shift [approximately 9:30 p.m. to 5:30 a.m.], (Record at 1243), giving petitioner supervisory responsibility for sixteen hours per day, and "on-call" responsibility for the remaining eight. Michael Zunk also advised petitioner that 7:00 p.m. to 3:00 a.m. were the preferred hours, although he had flexibility (Record at 1242). Petitioner was familiar with the job description for a captain (Record at 288; Pet. App. C), and also with the customs and practices involved with being a field captain, since he had been a patrolman in the field, a field sergeant, and a field lieutenant prior to his promotion, as well as spending approximately three and a half years as a supervisor in the Communications Branch (Record at 177) where he regularly contacted captains. Further, he

remembered an August 3, 1987 memo sent by Communications Branch Captain Charles Broeking (Record at 1016, 1097, Pet. App. D) which reminded dispatchers that field captains were not on any set work assignment.

Petitioner worked 7:00 to 3:00 for a period of disputed length (Record at 1243, 524, 552), and then discussed his perception that an officer of his rank provided no benefit on the street those hours in that area during that time of the year. The content of that discussion is disputed (Record at 1243, 1247, 1318, 1319, 472, 471, 1324, 1325), but petitioner's understanding was that Michael Zunk said, "You're the one on the street, work when you're needed." (Record at 1243, 1247).

During 1987 and early 1988, petitioner came to work between 1:00 and 2:00 p.m. (Record at 525, 561, 562, 1054, 1067, 1247) on a daily basis (Record

at 562) and maintained his availability until midnight or later (Record at 1200, 1247, 1248), thus maximizing his accessibility for problem-solving to subordinates. On one or two days per week, petitioner split his shift to work for a private employer in a capacity which he believed was approved and encouraged by the now deceased Director of Public Safety (Record at 571, 1288, 1334, 1335), characterized as the "boss of the Chief" (Record at 336), and then returned to work additional hours for the Indianapolis Police Department. Two State's witnesses testified that petitioner's actual activities at the site of the private employer would take a maximum of thirty minutes (Record at 746, 674). His long-time employment with this private employer was well-known in the Department, and petitioner never tried to hide it, meeting openly with City officials in full uniform at the private employer's site (Record

at 747, 748, 1121, 1122, 1269, 1271). The State was unable to point to any job responsibility left uncompleted (Record at 338) by petitioner as a result of the split shift, but believed that he must have shirked his duties, even though it was admitted that they had "no basis for that opinion." (Record at 340).

The Indianapolis Police Department Internal Affairs Branch and a unit of police investigators assigned to the prosecutor's office initiated surveillances to determine if petitioner was spending an uninterrupted eight hours on Quadrant Three, although remaining on Quadrant Three was never required and never suggested. The surveillances were of petitioner, his family, and his home, including viewing into his windows. After the third surveillance, and at the suggestion of the police unit assigned to the prosecutor's office

(Record at 925), Deputy Chief James Campbell advised petitioner that he was under investigation (Record at 1286, 313) for possible work hour violations. When petitioner explained what he was and was not doing, and why, Deputy Chief Campbell advised him that he knew that petitioner was working enough hours. Neither Deputy Chief Campbell nor Major Michael Zunk advised petitioner that he should stop or that his actions were, in any way, wrong or illegal (Record at 1286, 1287, 388, 514), which led petitioner to believe that they understood and agreed with petitioner. Another surveillance took place, in which it was determined that petitioner was going to continue the practice of splitting his shift to work for his private employer. As a result of the report of the investigatory team, then Chief of Police Paul Annee suspended petitioner without pay for six months. a loss of approximately

$18,000.00 which remains uncompensated, and recommended his termination (Record at 177). The Chief advised petitioner that if he did not retire, far worse things could happen to him. Since no one would explain to petitioner how his activities constituted neglect of duty, substandards performance, or violation of a rule, regulation, or law as he had been administratively charged, petitioner did not retire.

Proceedings in trial court.

On August 25, 1988, petitioner was indicted on five counts of theft, one count of attempt theft, and six counts of official misconduct (Record 2-6). He was found guilty on July 18, 1989 of one count of theft and four counts of official misconduct. (Record 149-150). The felony theft count of which petitioner was found guilty charged the following:

that David B. Bowman, on or about

> the 25th day of November, A.D., 1987 at and in the County of Marion and in the State of Indiana, did knowingly exert unauthorized control over property of the City of Indianapolis, to-wit: UNITED STATES CURRENCY, by creating or confirming the false impression that on November 14, 1987, David B. Bowman worked an eight-hour shift as a police officer of the City of Indianapolis, when in fact said David B. Bowman was absent from his assigned duties for the purpose of pursuing private employment; with intent to deprive the CITY OF INDIANAPOLIS of any part of the value or use of the aforesaid property; all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

Record at 4.

The official misconduct counts of which petitioner was found guilty alleged that on four different dates, petitioner, as a police officer of the City of Indianapolis, submitted a false or misleading record of work hours with intent to obtain UNITED STATES CURRENCY for himself.

Petitioner raised Fair Labor Standards Act arguments in the hearing on his motion to dismiss (Record at 24, 28, 29, 219, 221, 223, 224, 225). In addition, the

petitioner asked the trial court to take judicial notice of the Fair Labor Standards Act and the regulations duly promulgated thereunder, and the trial court, over the State's objection, did take judicial notice of the Act and the regulations (Record at 374-377). However, petitioner's requested instructions on there being no minimum workday and workweek for police officers in Indiana (R74; Pet. App. E), the maximum workday and workweek for police officers in Indiana (Record at 75; Pet. App. F), the meaning of "salary basis" (Record at 76; Pet. App. G), primary duty for exempt executive employees (Record at 77; Pet. App. H), required recordkeeping for exempt executive or administrative employees (Record at 76; Pet. App. I), and that the court had taken judicial notice of the maximum workday statute, the repeal of the minimum workday statute, the existence of the Fair Labor Standards

Act and regulations (Record at 82, Pet. App. J) were refused by the court over petitioner's objection (Record at 1368).

In addition, petitioner's job description (Record at 288; Pet. App. C), which shows an exempt classification, was admitted into evidence, and discussed in depth. General Order No. 20.03, the Indianapolis Police Department's work rule on compliance with the Fair Labor Standards Act, was introduced by the State (Record at 299; Pet. App. B), which argued that the Indianapolis Police Department's work rule on the Fair Labor Standards Act should guide the trial court, not the United States Code and Code of Federal Regulations, which the State, the trial court, and the Court of Appeals determined were irrelevant to a work hours violation.

Further, there was testimony from many witnesses about the Fair Labor Standards Act, the meaning of being

exempt, and the time practices of the Indianapolis Police Department, but the most significant amounts are found in the testimony of Richard Dorsey, Finance Branch captain (e.g., Record at 586, 601, 611, 615), James Campbell, Deputy Chief of Operations (e.g., Record at 300, 301, 358, 359, 363, 370, 452), and petitioner himself (Record at 1251, 1321, 1322, 1337).

Proceedings upon appeal

Petitioner included substantial argument on the question presented herein in his appellate briefs. He argued that an employee who has been exempted from the payment of overtime under 29 U.S.C. § 213(a)(1), as petitioner was, must be subject to "salary basis" treatment under 29 C.F.R. § 541.118(a), which requires that an employee receive his full predetermined salary for any week in which he performs any work without regard to the number of days or hours

worked. Since his pay as an exempt executive or administrative employee could not be tied to the hours or days he worked, he argued that his employer could not be misled or deceived into paying him his salary based on the hours on his time card. His initial brief in the Court of Appeals of Indiana, Second District, devoted pages 17-36 to a discussion of the requirements of the Fair Labor Standards Act, particularly 29 U.S.C. § 207, 29 U.S.C. § 213(a)(1), 29 C.F.R. § 541.1, 29 C.F.R. § 541.2, and 29 C.F.R. § 541.118, and the Act's application to the evidence produced at trial. He presented these arguments in his brief and his reply brief. On June 26, 1991, the Court of Appeals, Second District, affirmed Petitioner's convictions (Pet. App. A), saying:

> . . . Whether the City is in compliance with the Fair Labor Standards Act is of no consequence. . . . .

> In no event is Bowman's status or the City's compliance with the Act an issue relevant to a criminal prosecution. Bowman is not charged with violating the Act; he is charged with violating the criminal law of Indiana.
>
> The claim is Bowman violated the criminal law of Indiana by creating or confirming the false impression he worked eight specific hours for the City to obtain his pay for that eight hour period and, for the official misconduct convictions, was a public official when he created or confirmed the false impression. The issue is whether the State met its burden of proving a nexus between Bowman's pay and his time records. On this point the evidence is an officer holding the rank of captain who works less than 2,080 hours in the course of a year will not receive the annual salary for a captain.

On July 13, 1991, petitioner filed a petition for rehearing. Among the issues petitioner included was the following:

> The Court of Appeals decision that the Fair Labor Standards Act was irrelevant erroneously decides a new question of law, i.e., whether an employee who reasonably relied on his employer's classification of him as an FLSA exempt executive or administrative employee, which requires that his pay not be based upon the hours he works, can be prosecuted for theft and official misconduct based upon his work hours, because it was pertinent to whether

a crime could have occurred and whether specific intent existed.

On August 15, 1991, rehearing was denied.

On September 3, 1991, petitioner timely filed a petition to transfer and supporting brief with the Indiana Supreme Court. He included his Fair Labor Standards Act arguments. The Supreme Court of Indiana denied transfer without opinion on November 20, 1991.

REASONS FOR GRANTING THE PETITION

The Indianapolis Police Department, as petitioner's employer, voluntarily chose to classify petitioner as an executive or administrator, "as those terms are defined in the [Fair Labor Standards] Act." (Record at 299; Pet. App. B). The bona fide executive, administrative, or professional exemption is found at 29 U.S.C. § 213(a)(1) (Pet. App. K), and provides that minimum wage and overtime provisions of the Act do not apply with respect to executive, administrative,

or professional employees "as such terms are defined and delimited from time to time by regulations of the Secretary . . . . " The executive exemption is defined at 29 C.F.R. § 541.1, and the administrative exemption at 29 C.F.R. § 541.2. The job duties outlined on petitioner's job description (Record at 288; Pet. App. C) arguably qualified petitioner under either the executive or administrative exemptions, provided that he was also compensated on a "salary basis," pursuant to 29 C.F.R. § 541.118 (Pet. App. L). Section 541.118 requires that the employee receive a predetermined amount on a regular basis as part or all of his compensation without regard to the number of days or hours worked in any week where the employee does, in fact, work, and does not permit reductions in pay based upon quality or quantity of the employee's work, unless the employee is absent for a full day.

This provision has been subject to frequent interpretation by lower courts, which have uniformly held that "this particular regulation pertaining to 'salary basis' compensation must be taken to mean precisely what it says . . . . ", Craig v. Far West Engineering, 265 F.2d 251, 259 (9th Cir. 1959). In a similar vein, the Third Circuit has stated that:

> . . . salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it . . . . Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes. Brock v. Claridge Hotel and Casino, 846 F.2d 180, 184 (3rd Cir. 1988).

Petitioner was advised of his exempt classification by work rule (Record at 299; Pet. App. B), by his job description (Record at 288; Pet. App. C), and in training classes conducted by the

Indianapolis Police Department Finance Branch (Record at 534). After having been advised that he was not eligible for paid overtime due to his exempt status, and eligible for compensatory time under limited circumstances due to the FOP contract (Record at 1213), petitioner was regularly permitted to work on his days off without compensation (Record at 1166) by one supervisor, and was permitted by Michael Zunk to work from what Michael Zunk though was approximately 1:00 p.m. to midnight without additional compensation. Petitioner knew what the salary basis requirement was as a result of his classes in labor law and this was further reinforcement for his belief that the City had exempted him in good faith. Michael Zunk never told petitioner not to work the additional hours (Record at 538, 1249), and petitioner never heard anyone classify him as an hourly employee prior

to his trial. His compensation was determined by City ordinance. In addition, Michael Zunk, as petitioner's immediate supervisor, was required to sign off on petitioner's time cards prior to when they were submitted to the Finance Branch (Record at 485, 486, 498), which distributed payroll checks prior to submission of employee time cards (Record at 586). Due to petitioner's misunderstanding of the purpose of a time card for an exempt executive or administrative employee (Record at 1256, 1260), his time cards generally showed 4:00 p.m. to midnight, and Michael Zunk signed off on Petitioner's time cards prior to when he submitted them to the Finance Branch and without mentioning that the time cards were obviously incorrect. Michael Zunk testified that petitioner ordinarily came to work between 1:00 and 2:00 p.m. (Record at 525), and he believed that petitioner worked until

midnight, as the time card showed. Therefore, Michael Zunk, as petitioner's supervisor, necessarily did one of two things: Michael Zunk either permitted petitioner to work many uncompensated hours, believing that he was an hourly employee, or he also believed, as did petitioner (Record at 1251, 1337, 1252, 1256, 797, 1213, 1260) that petitioner's pay was not tied to the hours petitioner worked. At trial all witnesses agreed that petitioner was exempt, although there was much confusion among the witnesses as to what being exempt meant. For example, James Campbell testified that General Order No. 20.03 (Record at 299; Pet. App. B) was meant to be in conformity with the Fair Labor Standards Act (Record at 358), but also stated that petitioner was exempt under the definition of the Indianapolis Police Department (Record at 452), apparently under the misconception that an

employer makes that determination independent of the requirements of federal law. Richard Dorsey testified that he thought that petitioner could be both exempt, but paid on an hourly basis (Record at 596). However, "it is well settled that reasonable regulations promulgated pursuant to statutory authority have the force and effect of law . . . . When a Government official or agency lawfully prescribes rules and procedures, these are binding on the Government as well as on the citizens." Pearce v. Director, Office of Workers Compensation, 647 F.2d 716 (7th Cir. 1981).

Petitioner was convicted of knowingly exerting unauthorized control over the currency of the City of Indianapolis by creating or confirming the false impression that he worked an eight hour shift one specific day, and that he submitted false or misleading records of his work hours with intent to obtain his pay.

There was no allegation that petitioner worked fewer than 160 hours per twenty-eight day period or 2,080 hours per year as required by the FOP contract with the City (Record at 1213). The allegation was that he simply was not working the specific hours they allege they thought he was working. The State reasoned that if his time card showed 4:00 to 12:00, any time worked beyond that period was volunteered, and time petitioner was absent was noncompensable. For example, if petitioner's time card on a particular day showed 4:00 to 12:00, but, instead, he came into work at 8:30, left at 4:30, but returned at 5:00 p.m., and worked until 1:00 a.m., petitioner would be guilty of theft, due to his absence for thirty minutes between 4:00 and 12:00; petitioner, also, would not be eligible for overtime for the periods between 8:30 a.m. and 4:00 p.m., and for the hours beyond midnight.

However, even though Indiana still has a statute which limits the maximum workday and maximum workweek, I.C. 36-8-4-8, the minimum legal workday statute, I.C. 22-2-1-1, was repealed by Acts 1982, P.L. 133, Sec. 1. There is no legal requirement that any Indiana citizen work an eight hour day. In fact, many of the police officers subject to the contract (Record at 1213) relied on, do not work eight hour shifts or forty hour weeks. Further, petitioner questions whether any exempt executive or administrative, whose pay necessarily may not be tied to the hours he works, 29 C.F.R. § 541.118, can be required to work an eight hour day unless his or her job can only be properly completed during that specific eight hour period. Petitioner's job description said "varying shifts," and he was the only field captain for that area of the City twenty-four hours per day. His responsibilities

were not limited to a specific eight hour period, and he was routinely called out to handle quadrant matters occurring during other time frames. It is petitioner's position that the lower court's decision that the Fair Labor Standards Act was irrelevant erroneously decides a new question of law which is either totally dependent on federal wage and hour law, or so interwoven that it cannot be separated from federal wage and hour analysis: whether an employee who reasonably relied on his employer's classification of him as exempt under 29 U.S.C. § 213(a)(1), which requires that his pay not be tied to the hours he works, can be prosecuted for theft and official misconduct based upon his work hours. Certainly the Fair Labor Standards Act was pertinent to the determination of whether crime could have occurred or whether specific intent existed. To conclude otherwise is to exempt Indiana

from compliance with federal law.

Importance of this decision: the City of Indianapolis views petitioner's case as authority for the correctness of its wage and hour interpretation. While no other police employee has been prosecuted since petitioner, both a sergeant and lieutenant were suspended without pay for similar behaviors. The lieutenant stopped at his private employer's workplace which is in the same area that the lieutenant works for the City, to pick up his paycheck, which did not interfere in any way with his Departmental duties.

There <u>has</u> been a message sent by this decision: the message is that an employer has no legal obligation to comply with federal laws or regulations the employer dislikes, unless sued into compliance by an employee with sufficient knowledge that a cause of action may exist, the financial resources with

which to pursue that lawsuit, and the fortitude to sue an employer for whom he or she needs and wants to continue to work to make a living. In respect to wage and hour law specifically, this decision provides employers a state criminal law means by which employers can circumvent their responsibilities to comply with applicable wage and hour legislation. Since it has worked for the City of Indianapolis, it is to be expected that other governmental units will also try this approach, and there is no reason to conclude that it will be limited to Indiana.

One need only shepardize 29 U.S.C. § 213(a)(1) or 29 C.F.R. § 541.118 to discover that governmental bodies remain unwilling to accept that Congress intends that governmental employees be protected by the remedial provisions of the Fair Labor Standards Act. In what seems like a never-ending effort to avoid

compliance, governmental units devise policies designed to avoid the blatantly simple requirements of 29 C.F.R. § 541.118. For example, less than two months after this Court denied certiorari in Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. den., 111 S. Ct. 785 (1991), the San Diego County Board of Supervisors amended its compensation ordinance to provide that employees subject to the salary basis treatment would be paid for absences from work of less than a day, but only if they had no leave time available, and then made leave time available in increments as small as one-tenth of an hour. Service Employees Int'l Union, Local 102 v. County of San Diego, No. 90-1211-GT-M, 1992 U.S. Dist. LEXIS 2156, (S.D. Cal. 1992). See also John J. Hilbert, Jr. v. Dist. of Columbia, No. 90-2973, 1992 U.S. Dist. LEXIS 1946, 30 Wage

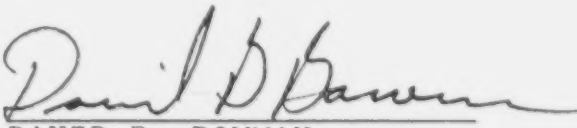
& Hour Cas. (BNA) 1263 (Dist. D.C. 1992).

Private sector employers subject to the regulations have adjusted by utilizing more efficient personnel allocation and management, and have accepted the fact that an employer's desire to avoid overtime payments is an insufficient reason to exempt an employee. The same can and should be expected of public sector employers.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,



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